NO. 13-19-00500-CV

IN THE COURT OF APPEALS
THIRTEENTH COURT OF APPEALS DISTRICT
CORPUS CHRISTI, TEXAS

TEXAS AUTO SALVAGE, INC. ET AL.,
Appellants,

V.

D D RAMIREZ, INC. ET AL.,
Appellees.

ON APPEAL FROM THE 37TH DISTRICT COURT, BEXAR COUNTY, TEXAS
HONORABLE MICHAEL MERY, PRESIDING
CAUSE NO. 2010-CI-02500

APPELLEES' BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe that oral argument will aid the Court in resolving this appeal. The record clearly supports the judgment and the relevant law is well settled. Should the Court, however, grant appellants' request for oral argument, appellees reserve the right to participate in any scheduled argument.

STATEMENT REGARDING THE ISSUES PRESENTED

After considering the parties' briefing and the record, the Court should conclude the following about the issues presented in this appeal:

- The trial court did not err in granting the JNOV motion because appellants (1) lack standing to bring their "statutory" public nuisance claim, (2) the "statutory" public nuisance claim arising out of the alleged dereliction of duties by the City of San Antonio is not an independent cause of action recognized in Texas, and (3) the answers to the "statutory" public nuisance jury question are immaterial because the question failed to submit a controlling issue;

- The trial court correctly granted a directed verdict on appellants' common-law public nuisance claim because appellants introduced no evidence of a substantial special injury;

- Appellants did not present a proper claim under the Uniform Declaratory Judgments Act;

- Appellants waived and failed to preserve any complaint regarding the trial court's decision to exclude Keith Fairchild and prevent Jerry Arredondo from testifying as an expert witness;

- Even if appellants did not waive or fail to preserve their challenge to the exclusion of Keith Fairchild, the trial court did not abuse its discretion in excluding Fairchild because his testimony and opinions are based on pure speculation;

- Even if appellants did not waive or fail to preserve their challenge to the trial court's decision not to permit Jerry Arredondo to testify as an

expert witness, appellants have not shown how or why that decision constitutes an abuse of discretion and have not shown how that decision resulted in harmful error; and

- The jury's negative findings on appellants' private nuisance claim are not against the great weight and preponderance of the evidence.

STATEMENT REGARDING RECORD CITATIONS

Citations to the record are cited in the format set forth below. Citations are generally to the page number when the record is viewed in a PDF reader rather than to the bates number assigned by the district clerk or the exhibit number assigned during the trial.

- Clerk's Record – [Volume #] *CR* [PDF page #]

- Reporter's Record – [Volume #] *RR* [PDF page #]:[line]

- Reporter's Record Exhibit Volume – *16 RR* [PDF page #]

TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

Appellees D D Ramirez, Inc., Danny Ramirez Recycling, Inc., San Antonio Auto and Truck Salvage, Danny's Recycling & Precious Metals, LLC, Danny's Recycling, Inc. and Daniel Delagarza Ramirez (collectively and individually referred to as Ramirez) file this brief requesting that the Court affirm the trial court's final judgment.

STATEMENT OF FACTS

I. The City of San Antonio regulates metal recyclers.

Chapter 16 of the San Antonio Code of Ordinances sets forth the requirements applicable to metal recyclers. *5 RR 40:15-21*. For example, a metal recycling entity is required to obtain an annual license from the City and its property must have proper zoning. San Antonio, Tex., Code of Ordinances ch. 16, §§ 16-205(a), 16-204 (2020). Chapter 16 also sets forth numerous other requirements that relate to a metal recycler's operations, *e.g.*, fencing, waste containment, and weed and brush maintenance. *Id.* §§ 16-210.2, 16-210.3.

The City's Development Services Department (Department) employs code enforcement officers who are authorized to conduct monthly inspections at metal recycling yards to ensure compliance with Chapter 16. *Id.* § 16-210.7(a) (2020); *5 RR 37:1-5, 39:2-12*. The Department currently

tracks 82 metal recycling and salvage yards.[1] *5 RR 41:20-24*. Since 2015, 14 of the 82 metal recycling and salvage yards have closed as a part of and in response to the City's efforts to enforce Chapter 16. *5 RR 110:10-23, 143:22-25*. The Department continues to track the now-closed 14 metal recycling and salvage yards to ensure they do not reopen. *5 RR 110:15-18*.

The City does not apply Chapter 16 in a draconian manner. The City's overall goal is to get yards into compliance. *5 RR 71:10-11, 100:14-24; 16 RR 1651*. When a code compliance officer is conducting an inspection, he or she fills out an inspection report in which he or she determines whether the operator is in compliance or whether there is a violation of some provision in Chapter 16. *See 16 RR 1485, 1563-64*. If there is a violation, the operator is given a notice of violation and then is given an opportunity to make the necessary correction to bring himself into compliance. *See 16 RR 1485, 1563-64; see also 5 RR 72:2-6*.

A notice of violation is not synonymous with a citation. *5 RR 66:7-17*. A citation is issued when the operator has failed to correct a previously noted violation. *See 5 RR 66:7-17*. A citation can result in a criminal proceeding in

[1] A salvage yard is distinct from a metal recycling yard. In a salvage yard, cars are brought to the yard and the vehicles are dismantled and the parts are sold. *10 RR 9:20-25; 16 RR 1562*. In a recycling yard, the component parts are removed and the remaining metal is processed and recycled. *10 RR 10:1-11; 16 RR 1562*. Division 1 in Chapter 16 governs salvage yards and Division 2 in Chapter 16 governs metal recycling yards. *See* San Antonio, Tex., Code of Ordinances ch. 16 (2020).

municipal court. *5 RR 66:14-17*. Alternatively, a civil citation may be issued, which results in a civil administrative proceeding before a hearing officer. *5 RR 67:2-13*.

II. The Hacks and Ramirez are direct competitors, have a long history, and their relationship can be aptly described as contentious.

Appellants Gary Hack and Daniel Hack are in the metal recycling business. Daniel's company, appellant Texas Auto Salvage, Inc. (TASI), operates a recycling yard at 609 Somerset Road in San Antonio. *3 RR 92:9-14*. Ramirez is also in the metal recycling business. He operates a recycling yard across the street at 925 Somerset Road. *3 RR 120:6-10; 10 RR 10:12-15*. The Hacks also operate another recycling yard at 1537 Somerset Road under the Acme Auto Recycling name. *3 RR 2-3*. Ramirez, too, operates an additional recycling yard at 819 Somerset Road. *10 RR 10:19-24*. He also operates an auto salvage yard at 914 Somerset Road, which is opposite from his recycling yards. *10 RR 11:3-5*.

The Hacks and Ramirez have known one another for many years and had what Daniel Hack described at trial as only a business relationship. For example, Ramirez sold scrap metal and vehicles to TASI. *3 RR 96:15-19*. Ramirez would loan money to Gary Hack from time to time. *3 RR 110:17-21*. In all, Ramirez loaned Gary more than $100,000.00 over several years. *10*

RR 63:23-25; 10 RR 64:1. The relationship between the Hacks and Ramirez, however, eventually soured. Daniel blamed the falling out on a disagreement regarding a real estate transaction between the Hacks and Ramirez. *3 RR 110:3-16*.

The parties' already strained relationship devolved even further in the years that followed the parties' decision to cut business ties. The parties are now simply direct competitors with little to no regard for one another. For example, Daniel Hack authorized the hiring of a private investigator to investigate Ramirez. *3 RR 162:10-16*. And the Hacks placed a sign at the TASI yard, which is across the street from one of Ramirez's yards, that says "Don't get screwed, come see your weight here." *10 RR 69:7-19; 16 RR 1270*.

The parties have accused one another of committing various improper actions against the other. Daniel Hack accused Ramirez of "playing chicken" with his wife while driving down Somerset Road. *3 RR 101:16-24*. Ramirez accused the Hacks of harassing him and his family by having them followed by unknown persons. *10 RR 46:3-25; 10 RR 47:1-8, 18-25; see also 11 RR 56:3-9*. Further, Ramirez claimed Gary Hack hit him with his car in a parking lot, knocking Ramirez onto the hood. *10 RR 41:1-15*. Ramirez also alleged the Hacks hired two women to protest in front of Ramirez's yard with signs encouraging potential customers to avoid doing business with Ramirez. *10*

RR 44:7-24. Finally, Ramirez believed the Hacks were involved with an arson fire that destroyed his car crusher. *See 10 RR 29:2-22, 30:14-25, 31:4-17, 84:18-23*.[2]

III. Appellants resort to litigation to allegedly level the competitive playing field.

Appellants filed suit against Ramirez in 2010 asserting claims for defamation, business disparagement, invasion of privacy, tortious interference with existing contracts and prospective contractual relations. *1 CR 16-23*. Appellants also sought temporary and permanent injunctions. *1 CR 23-24*. Ramirez answered and counterclaimed. *1 CR 32, 77*. In the years that followed, the parties filed numerous amended and supplemental pleadings to add additional claims, defenses, and parties.

While they were litigating their claims against Ramirez, the Hacks and one of their business entities, KMH LLC d/b/a Acme Recycling, filed suit against the City. Summarized, the Hacks complained the City was enforcing its ordinances too leniently with respect to Ramirez and too strictly with respect to appellants. *See 1 CR 306*. The City removed the case to federal court on the basis of federal question jurisdiction given an allegation "that

[2] There was testimony at trial that appellants' attorney made an unsolicited call to Ramirez's attorney to tell him the appellants had nothing to do with the fire. *10 RR 30:14-17*.

the City Code of the City of San Antonio has been discriminatorily applied to Acme Recycling in violation of the Texas and Federal Constitutions." *1 CR 305*.

The federal district court, acting *sua sponte*, remanded the case to state court. The court recited the rule that "equal protection claims premised on selective enforcement of a city code require a plaintiff to plead and prove that the act or acts of the city official were motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of some other constitutional right." *1 CR 306*. The court found no improper motive allegations in appellants' pleadings. There was, therefore, no federal question to vest the court with jurisdiction. *1 CR 307*. Instead, the court observed that the "case is essentially a local dispute between business rivals which should be heard and determined by the state courts of Bexar County, Texas." *1 CR 307*.

Upon remand, the suit against the City was consolidated with appellants' suit against Ramirez. *1 CR 292*. Appellants then amended their pleadings and named several City employees as additional defendants. *1 CR 308*. Appellants also added allegations with respect to a federal equal protection claim that were not in their original petition. *1 CR 315* (claiming that the City and its employees "were motivated by improper considerations,

such as race (Gary Hack is white), religion (the Hacks are Mormon), and/or the desire to prevent the exercise of some other constitutional right, such as the first amendment right to engage in freedom of speech"), *324* ("And this selective enforcement of a position taken with respect to Chapter 16 is based upon discriminatory, arbitrary and/or invidious motives or practices at COSA as it relates to Acme.").

Based upon the amended pleading, the City again removed the case to federal court.[3] *1 CR 338*. The parties litigated in federal court for some time, which included filing amended pleadings. *1 CR 352-56*. Appellants eventually dismissed with prejudice their claims against the City and its employees. *1 CR 356-57*. Appellants then sought to have the case remanded to state court. *1 CR 357*. In the report and recommendations on appellants' motion to remand, the magistrate judge indicated that the motion would be denied unless appellants dismissed the federal law causes of action against Ramirez that had been added in an amended pleading. *1 CR 345*. Appellants did so. *1 CR 345*. Accordingly, the motion to remand was granted. *1 CR 346*.

[3] The City also filed a plea to the jurisdiction based upon sovereign immunity and asserted the trial court did not have jurisdiction over appellants' claims for negligent misrepresentation, selective enforcement, and related request for declaratory relief. *1 CR 294*. The plea to the jurisdiction, however, was never heard because appellants amended their pleading to include a federal law cause of action. *1 CR 339*.

As the litigation continued against Ramirez, appellants filed another suit against the City in 2015. *See Texas Auto Salvage, Inc. v. City of San Antonio*, No. 2015-CI-04863 (166th Dist. Ct., Bexar County, Tex. Mar. 23, 2015). Appellants claim that this second lawsuit against the City was necessary because—according to their pleadings—Ramirez's competing business at 925 Somerset Road is not in compliance with the City's ordinances and should not be permitted to continue operating. *See 1 CR 664.* The suit remains pending.

By the time the case went to trial appellants had added claims for common-law public nuisance, "statutory" public nuisance, and private nuisance, to the previously pleaded defamation and invasion of privacy/intrusion on seclusion claims. *1 CR 677-90.*[4] Appellants also sought declarations regarding alleged violations of the City's ordinances, attorney's fees, and a permanent injunction. *1 CR 690*. Several additional entities related to Daniel Ramirez were added as defendants. *1 CR 666-67.*

Ramirez's counterclaims also evolved over the course of the litigation. At the time of trial, Ramirez asserted claims for defamation, business

[4] Ramirez acknowledges that the Texas Supreme Court has explained the term "nuisance" does not refer to a cause of action or to the defendant's conduct or operations, but instead to the particular type of legal injury that can support a claim or cause of action seeking legal relief. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 594 (Tex. 2016) (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997)). Nonetheless, Ramirez refers to appellants' nuisance "claims" for the sake of simplicity.

disparagement, invasion of privacy/intrusion on seclusion, tortious interference with existing contracts and with prospective contractual relations, and arson. *1 CR 408-417*. Ramirez also sought declaratory relief, injunctive relief, punitive damages, and attorney's fees. *1 CR 414-17*.

IV. Ramirez was in compliance with the City's ordinances at the time of trial.

The City confirmed during the trial that Ramirez was in compliance with the City's ordinances. *See 6 RR 80:3-6*. He had obtained all necessary certificates of occupancy from the City. *See 6 RR 17:4-6; 10 RR 11:10-22*.[5] He held valid licenses to operate metal recycling facilities. *6 RR 82:11-14; 10 RR 20:1-8, 34:1-5*. There were no unresolved citations concerning Ramirez's properties. Ramirez had also obtained valid nonconforming use permits that allowed him to operate his recycling yards and not violate any zoning ordinances. *6 RR 14:4-25, 15:1-12; 16 RR 1197-98*.

[5] After Chapter 16 was enacted in 2012, a dispute between Ramirez and the City emerged concerning Ramirez's failure to obtain certificates of occupancy for each individual building on his properties. *10 RR 18:11-22*. Prior to 2012, a certificate of occupancy was issued for an entire property and not for each individual building. *See 6 RR 13:12-25; 10 RR 17:21-25, 76:18-25*. The City issued citations to Ramirez for the failure to have all the necessary certificates of occupancy. *10 RR 11:10-14; 11 RR 23:11-24*. Ramirez worked with the City to resolve the dispute and the citations were later dismissed. *6 RR 15-18*. Ramirez obtained all necessary certificates of occupancy in early 2017, long before the underlying trial. *10 RR 38:23-25; 16 RR 1187, 1189, 1191, 1193, 1195*.

V. A trial is held in 2018 and ultimately a take nothing judgment is signed in Ramirez's favor.

After years in litigation, a trial was held in the fall of 2018. The parties focused their trial presentations on select claims rather than on the entirety of those claims presented in their respective pleadings. Appellants focused upon their nuisance claims. Appellants abandoned their defamation and invasion of privacy claims. *9 RR 159:24-25, 160:1-16*.

The trial court made several rulings that affected the issues that were submitted to the jury and form the basis for some of the appellants' complaints on appeal. Ramirez objected to appellants' attempt to offer Keith Fairchild as an expert on loss of market value, which according to appellants, included lost rents and profits. *8 RR 13:10-13, 21:1-9*. Ramirez asserted that Fairchild had to be excluded because his testimony and opinions were purely speculative in nature. *8 RR 21:1-9*. The trial court sustained the objection and Fairchild was not permitted to testify. *8 RR 22:7-11*. Appellants subsequently abandoned any claim for monetary damages. *11 RR 130:5-6; see also 15 RR 15:11-12*. The trial court also refused to permit Jerry Arredondo, one of appellants' witnesses, to testify as an expert witness. *8 RR 84:4-13*. He was, however, permitted to testify as a fact witness with respect to the events that he observed and was involved in. *8 RR 87:8-10*.

At the conclusion of appellants' case in chief, Ramirez sought a directed verdict on appellants' common-law public nuisance and private nuisance claims. *9 RR 138:14-21, 155:7-25, 156:1-22*. The trial court denied the motion with respect to the private nuisance claim and conditionally denied it with respect to the common-law public nuisance claim. *9 RR 152:14-18, 159:20-22*. The trial court, however, reconsidered its conditional ruling on Ramirez's motion for directed verdict during the charge conference. The trial court determined that appellants lacked standing to pursue a common-law public nuisance claim because (1) they failed to meet their evidentiary burden and (2) a "public nuisance needs to be enforced by the agencies that are charged with that duty." *12 RR 23:16-25, 24:1-13*. Thus, no question on common-law public nuisance was submitted to the jury.

A. The jury charge and verdict.

The trial court submitted appellants' private nuisance claim and "statutory" public nuisance claim under Chapter 16 of the City's Code of Ordinances. *3 CR 978-980*. The nuisance questions included separate sub-questions with respect to Ramirez's three properties at 914, 819, and 925 Somerset Road. *3 CR 978-80*. The "statutory" public nuisance question was conditioned upon a question inquiring whether the City had been derelict in its duties relating to enforcement of Chapters 10 and 16. *3 CR 979*. The

charge also included a question regarding appellants' reasonable and necessary attorney's fees. *3 CR 981*.

The jury charge included questions on Ramirez's counterclaims for arson, invasion of privacy, corresponding damage questions, and questions relating to punitive damages. *3 CR 982-89*. The jury was also asked to determine the value of Ramirez's reasonable and necessary attorney's fees. *3 CR 990*.

The jury found that Ramirez did not create a private nuisance at any of his properties. *3 CR 978*. The jury, however, found that the City had been derelict in its duties relating to enforcement of its ordinances. *3 CR 979; 3 CR 980*. Based upon the affirmative answer to the foregoing question, the jury was asked to determine whether Ramirez had created a public nuisance—as defined in Chapter 16—at any of the named properties. *3 CR 980*. The jury answered "yes" for 819 and 925 Somerset Road and "no" for 914 Somerset Road. *3 RR 980*. Although appellants sought $296,009.97 in attorney's fees and expenses, the jury awarded only $86,000.00. *3 CR 981; 11 RR 96:8-13*. The jury did not find in Ramirez's favor on his counterclaims. *3 CR 982-91*.

B. Appellants' proposed judgment and Ramirez's JNOV Motion.

Appellants moved for entry of a final judgment on the jury's verdict. Appellants sought a final judgment granting permanent mandatory injunctive relief that would require Ramirez to take certain actions and give appellants—as opposed to the City—enforcement powers. The proposed judgment would require Ramirez to conduct a Phase II Environmental Site Assessment that called for soil sampling. *15 RR 10:10-13*. And, depending upon the results of the assessment and testing, Ramirez could be required to remediate the issues identified in the assessment and implement a Comprehensive Environmental Management Plan and Effluent Disposal & Management Plan. *See 15 RR 11:4-5, 40:1-4, 50:21-25, 51:1-4*. The proposed judgment also required Ramirez to "'provide *Plaintiffs* with quarterly assessments of the environmental compliance status of the properties located at 819 and 925 Somerset Road.'" *3 CR 1009* (emphasis added). In addition, in the event Ramirez was cited for three or more violations of Chapter 16 within a 6-month period, appellants—not the City—could seek a 30-day closure of the property. *3 CR 1009; 15 RR 10:21-25*. And should this occur a second time, appellants—again, not the City—could seek a permanent closure of the property. *3 CR 1009; 15 RR 10:21-25*.

Ramirez objected to the proposed judgment, arguing the requirements appellants sought to impose were improper because they went beyond what is required by Chapter 16. *See 15 RR 10:4-17, 11:4-9, 50:12-20*. Further, Ramirez objected to the notion that appellants—as private citizens—should be granted the power to shut Ramirez's businesses down. *15 RR 10:21-25* (objecting to appellants' request to appoint themselves as "judge and jury"). The trial court, too, expressed concern about a private citizen's ability to enforce the City's ordinances through a mandatory injunction: "Now, Mr. Powell, I do have some issues with some paragraphs in your proposed judgment wherein you seem to put power in your client's hands, and I have a problem with that." *15 RR 41:13-16*. In response to the trial court's concern, appellants retreated and proposed appointing a receiver that would be responsible for enforcing the terms of the proposed mandatory injunction. *15 RR 42:15-22, 50:7-13; see also 3 CR 1009*.

In opposing appellants' motion for entry of judgment, Ramirez filed a Motion for Judgment Notwithstanding the Verdict seeking a take nothing judgment in his favor. *3 CR 1005*. Ramirez asserted the jury's affirmative findings must be disregarded because (1) appellants lack standing to pursue their "statutory" public nuisance claim; (2) there is no "statutory" public nuisance claim based upon the alleged dereliction of duty by a municipality

or governmental agency; (3) there is no evidence appellants suffered a special injury; (4) the questions did not submit a controlling issue to the jury; (5) the questions did not present a proper claim for declaratory relief; and (6) there is no evidence to show a public nuisance as defined in the Chapter 16. *3 CR 1008-12*. The trial court granted the motion without specifying the grounds in its order. *3 CR 1038*. The trial court then signed a final take nothing judgment. *3 CR 1032*. This appeal followed.

SUMMARY OF THE ARGUMENT

Appellants sought to use the courts to put a competitor out of business through nuisance claims. Appellants are, however, not entitled to this relief because they—as private citizens—lack standing to enforce municipal ordinances against other private citizens. The City has the exclusive authority to enforce its ordinances and declare a public nuisance as defined in its ordinances. Further, appellants' novel "statutory" public nuisance claim is unrecognized and could not have supported a judgment. And the jury's answers to the "statutory" public nuisance question are immaterial because the question failed to submit a controlling issue of law. The JNOV motion was, therefore, properly granted.

The trial court did not err in granting a motion for directed verdict on appellants' common-law public nuisance claim. Appellants failed to

introduce any evidence of a special injury, substantial or otherwise. Appellants completely failed to demonstrate how they have suffered an injury different in kind from that suffered by the general public. Therefore, the trial court correctly determined that no common-law public nuisance claim should be submitted in the jury charge.

Appellants' complaints about the trial court's decision to exclude Keith Fairchild and not permit Jerry Arredondo to testify as an expert have been waived through inadequate briefing. And even if the Court were to determine that appellants' briefing on these points is adequate, appellants still cannot prevail on appeal because they failed to preserve error by not making an offer of proof. Irrespective of appellants' failures, the trial court did not abuse its discretion in excluding Fairchild given that his testimony is based upon pure speculation. As for Arredondo, appellants have failed to demonstrate any abuse of discretion by not permitting Arredondo to testify as an expert. He was permitted to provide extensive testimony as a fact witness. In addition, appellants have failed to show that the trial court committed harmful error by not allowing Arredondo to testify as an expert.

The jury's negative findings on appellants' private nuisance claim are not against the great weight and preponderance of the evidence. The findings are clearly supported by the record. There is simply no evidence of one or

more of the essential elements required to show a private nuisance. Namely, there is no evidence that Ramirez's operations substantially interfered with appellants' use and enjoyment of their property. Accordingly, the Court should affirm the final judgment.

ARGUMENT

I. The trial court did not err in granting Ramirez's JNOV motion.

A. Appellants lack standing to pursue their "statutory" public nuisance claim because private citizens cannot enforce municipal ordinances.

Appellants' "statutory" public nuisance claim is nothing other than an attempt by private citizens to enforce the City's ordinances. Appellants' proposed judgment makes clear what their goal was in bringing this suit: they want to stand in the City's shoes and privately enforce its ordinances against a competitor. *See 3 CR 1009*. And if appellants believe that Ramirez is not in compliance with the various requirements set forth in Chapter 16, appellants sought the power to shut his businesses down. *See 3 CR 1009*.

Appellants have the burden to show they have standing to bring their claim. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). An assertion that there is no private cause of action to enforce a municipal ordinance presents a challenge to a plaintiff's standing. *City of Mansfield v. Savering*, No. 02-19-00174-CV, 2020 WL 4006674, at *12 (Tex. App.—Fort

Worth July 16, 2020, no pet. h.) (mem. op.). This Court should conclude, just as the trial court did, that appellants lack standing to bring their "statutory" public nuisance claim.

Private citizens are not entitled to injunctive or declaratory relief to address the alleged violation of a municipal ordinance. *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 359-60 (Tex. App.—Fort Worth 2018, pet. denied). The power to enforce an ordinance is vested solely in the municipality. *Id.* ("We agree that to declare and enjoin the Church's alleged violations of the Town's zoning ordinances is exclusively the province of a municipality."); *GTE Mobilnet of S. Tex. Ltd. P'ship. v. Pascouet*, 61 S.W.3d 599, 621-22 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (explaining that "only Bunker Hill may enforce its zoning ordinances").[6] Private citizens, therefore, lack standing to pursue "'do-it-yourself'" ordinance enforcement in the courts. *See Schmitz*, 550 S.W.3d at 359-60; *see also City of Mansfield*, 2020 WL 4006674, at *12.

[6] Generally speaking, the governmental entity charged with enforcement powers is in the exclusive position to determine whether a party is in compliance with the applicable laws and regulations. *See Nat'l Audubon Soc'y, Inc. v. Johnson*, 317 F. Supp. 1330, 1334-35 (S.D. Tex. 1970); *Garland Grain Co. v. D-C Home Owners Improvement Ass'n*, 393 S.W.2d 635, 639-40 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.). This rule is followed in other jurisdictions. *See, e.g.*, *Charlton v. Town of Oxford*, 774 A.2d 366, 373 (Me. 2001) ("Accordingly, only municipalities may bring an action for violations of such regulations."); *Engle v. Clark*, 90 P.2d 994, 995 (Ariz. 1939) (holding that a private citizen was not entitled to injunctive relief because he was not authorized to bring suit in the first place).

A city's determination that there is a public nuisance is an exercise of the city's police power. *See Kim v. State*, 451 S.W.3d 557, 561 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). There is no provision in Chapter 16 granting a private citizen the right to exercise that police power to enforce the requirements in Chapter 16 and declare a public nuisance as defined in it.[7] The power to enforce Chapter 16 is clearly vested solely in the City. *See* San Antonio, Tex., Code of Ordinances ch. 16, §§ 16-210.20, 16-210.7 (2020); *City of Mansfield*, 2020 WL 4006674, at *12 ("But enforcement is a right given to the political subdivision through an action for injunctive relief and civil and criminal penalties."). Appellants, therefore, lack standing to bring a public nuisance claim that permits a private citizen to enforce the City's ordinances. *See GTE Mobilnet*, 61 S.W.3d at 621-22; *see also City of Mansfield*, 2020 WL 4006674, at *12. Accordingly, the trial court correctly disregarded the jury's affirmative answers to questions relating to Chapter 16; the questions should never have been submitted and the answers could

[7] In some instances, the Legislature has granted private citizens the right to bring claims for some statutorily-defined public or common nuisances. *See, e.g.*, Tex. Civ. Prac. & Rem. Code § 125.002 (permitting an "individual" to bring a "suit to enjoin and abate a common nuisance" as described in Chapter 125 of the Civil Practice and Remedies Code); Tex. Health & Safety Code § 343.013(b) (permitting "a person affected or to be affected by a violation" of Chapter 343 of the Health and Safety Code to bring suit to enjoin a public nuisance occurring in an unincorporated area of a county). As stated above, there is no provision in Chapter 16 creating a private cause of action.

not have supported a judgment in appellants' favor. *See Alpert v. Riley*, 274 S.W.3d 277, 294 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

B. There is no distinct, independent claim for public nuisance that a private citizen may pursue to enforce a municipal ordinance that the City is—in the plaintiff's opinion—not enforcing.

Appellants' assertion that they can pursue a "statutory" public nuisance claim based upon the City's alleged dereliction of its duties is not supported by any of the authorities upon which they rely. None of the cases holds that a private citizen can bring suit to enforce a municipal ordinance where he disagrees with the manner in which a city is or is not enforcing its ordinances. In other words, there is no distinct private "statutory" public nuisance claim based upon the alleged dereliction of duties by a city or other governmental entity. Accordingly, the jury's affirmative answers with respect to a claim that is not recognized by Texas law had to be disregarded because they could not support a judgment. *See Hogue v. Propath Lab., Inc.*, 192 S.W.3d 641, 647 (Tex. App.—Fort Worth 2006, pet. denied); *see also Ordonez v. M.W. McCurdy & Co.*, 984 S.W.2d 264, 267 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("To survive a directed verdict, it is axiomatic that a party must state a theory of recovery recognized at law.").

In *American Construction Co. v. Seelig*, 133 S.W. 429 (Tex. 1911), the central issue was whether the defendant had received the requisite approval

from the Austin City Council to erect a fence and enclose a portion of a public alley. *Id.* at 431. The city's charter provided that a person could not occupy or use a public street for private purposes unless it was approved by the council through an ordinance. *Id.* at 430. The court concluded that the council's oral approval of the defendant's petition, as reflected in the council's meeting minutes, was not an "ordinance" as contemplated by the law. *Id.* at 431. Because the city council's action in granting the defendant's petition was essentially void, the court concluded that the trial court did not abuse its discretion in granting injunctive relief. *Id.* Thus, *Seelig* is not about a city being derelict in its duties and the creation of a private action; it simply concerns the legal effect, if any, of the city council's action on a citizen's request presented at a city council meeting.

The issue in *Bowers v. City of Taylor*, 24 S.W.2d 816 (Tex. Comm'n App. 1930), was whether a city ordinance permitting the closure of a public street and giving exclusive control of the street to a railroad company was void. *Id.* at 817. The court concluded that the ordinance was void. *Id.*

Bowers has no application in this appeal because appellants were not seeking to declare any of the City's ordinances void. Rather they sought to enforce them because, according to appellants, the City was not. There is a distinction between a suit in which a private citizen seeks a declaration that

an ordinance is void and a suit in which the private citizen challenges the manner in which a city complies with or enforces its own ordinances. *See Schmitz*, 550 S.W.3d at 354; *City of Mansfield*, 2020 WL 4006674, at *12-13. The latter is not permitted. *See GTE Mobilnet*, 61 S.W.3d at 621-22.

The opinions in *Ort v. Bowden*, 148 S.W. 1145 (Tex. Civ. App.—Galveston 1912, no writ), and *Boone v. Clark*, 214 S.W. 607 (Tex. Civ. App.—Fort Worth 1919, writ ref'd), also do not support appellants' novel legal theory. These opinions merely recite the general proposition that a plaintiff can pursue a public nuisance claim if he can show a special injury. *Ort*, 148 S.W. at 1148; *Boone*, 214 S.W. at 610-11. Neither opinion stands for the proposition that a private citizen is empowered to enforce a municipal ordinance against another private citizen through a "statutory" public nuisance claim when the city allegedly is not enforcing its ordinance.

Ort involved an appeal from the denial of an application for a temporary injunction on a public nuisance claim where the defendants closed a public street. 148 S.W. at 1145-46. Contrary to appellants' interpretation of *Ort*, it does not create a new, distinct cause of action based upon the alleged dereliction of duties by a municipality. A private citizen is permitted to pursue a public nuisance claim if a public street is closed irrespective of any action or inaction by a municipality so long as he shows a

special injury. *See Jamail v. Stoneledge Condo. Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.) ("'The encroachment or appropriation may or may not amount to nuisance; it becomes a nuisance when the right of the public to immediate use is affected.'") (citation omitted). *Ort* only stands for the proposition that a private citizen does not have to wait for the city to act before he can pursue a nuisance claim if he has sustained and can show a special injury. *See* 148 S.W. at 1148.

Boone involved a complaint by private citizens challenging the validity of an action taken by an elected body. The plaintiffs brought a claim for public nuisance against the county judge and county commissioners complaining about their decision to grant an oil and gas lease on all public roads in the county. *Boone*, 214 S.W. at 607. In affirming the trial court's order granting the plaintiffs' request for temporary injunctive relief, the court merely discussed one of the essential elements of a public nuisance claim: plaintiffs must "show some special injury to them which is not suffered by the public at large." *Id.* at 611. *Boone*, therefore, is similar to *Bowers* and dissimilar to this appeal because it does not involve an attempt by a private citizen to enforce an ordinance or other law against another private citizen. Rather, it involves a challenge to the validity of the

commissioners' court's actions in a suit against the government vis-à-vis the county commissioners and county judge. *See id.* at 607.

Finally, *Guetersloh v. Rolling Fork Owners Committee, Inc.*, No 14-95-01272-CV, 1996 WL 580931 (Tex. App.—Houston [14th Dist.] Oct. 10, 1996, no writ) (not designated for publication), has absolutely no application here. There is no discussion, much less any recognition, of a "statutory" public nuisance claim based upon a municipality's failure to comply with its duties. In the appeal, the appellant challenged the sufficiency of the evidence to support the trial court's mandatory injunction requiring him to perform certain tasks. *Id.* at *1. The court, however, concluded that the appellant's failure to bring forth a complete record foreclosed his evidentiary challenge. *Id.* at *2. The court also rejected the appellant's assertion that the trial court's injunction was vague and his attempt to draw a distinction between nuisance per se and nuisance in fact. *Id.* at *2-3. The numerous other issues raised by the appellant, such as the admission of hearsay evidence and the trial court's alleged comments on the weight of the evidence, have nothing to do with the issues presented in this appeal. Accordingly, the Court should reject any argument that there is a distinct, independent "statutory" public nuisance claim based upon the alleged dereliction of duties by a governmental entity.

C. The jury's affirmative findings on appellants' novel and unrecognized "statutory" public nuisance claim are immaterial and were correctly disregarded.

The jury's answers could also have been properly disregarded as immaterial because the "statutory" public nuisance question did not submit a valid controlling issue. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000); *see also Abdullatif v. Choudhri*, 561 S.W.3d 590, 604 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). The term "nuisance"—whether public or private—does not refer to a cause of action or to the defendant's conduct or operations, but instead to the particular type of legal injury that *can* support a claim or cause of action seeking legal relief. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 594 (Tex. 2016) (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997)). In other words, the term "nuisance" describes a type of injury that the law has recognized can give rise to a cause of action because it is an invasion of the plaintiff's legal rights. *Id.*

A legal injury, however, is neither the breach of a duty that gives rise to liability for the legal injury nor the damages that may be awarded as compensation for the legal injury. *Id.* Thus, the existence of a "nuisance" does not establish liability. Rather, whether a defendant may be held liable for causing a nuisance depends on the culpability of the defendant's conduct, in

addition to proof that the interference is a nuisance. *Id.* at 604. A defendant can only be liable for causing a nuisance if the plaintiff establishes that the defendant intentionally caused it, negligently caused it, or—in limited circumstances—caused it by engaging in abnormally dangerous or ultra-hazardous activities. *Id.* at 588; *Ortega v. Phan-Tran Prop. Mgmt., LLC*, No. 01-15-00676-CV, 2016 WL 3221423, at *4 (Tex. App.—Houston [1st Dist.] June 9, 2016, pet. denied) (mem. op.); *see also Likes*, 962 S.W.2d at 504; Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence* PJC 12.3A-C (2018) (setting forth 3 pattern charges for public nuisance addressing 3 different culpability standards).

The "statutory" public nuisance question only inquired into the *existence* of a public nuisance as that term is defined by the Municipal Code. It asked only this:

> Are any of the following Defendants a "public nuisance" as that term is defined by section 16-210.07(b) of the City of San Antonio Municipal Code, as set forth above?

3 CR 980. But the jury's affirmative finding does not give rise to any liability. *See Crosstex N. Tex. Pipeline, L.P.*, 505 S.W.3d at 594; *see also Plug v. SXSW Holdings, Inc.*, No. 1:15-CV-322-LY, 2016 WL 8078327, at *5 (W.D. Tex. Sept. 20, 2016), *aff'd sub nom. Smit v. SXSW Holdings, Inc.*, 903 F.3d 522 (5th Cir. 2018). Appellants would not, therefore, be entitled to any injunctive

relief. *See Hanson Aggregates West, Inc. v. Ford*, 338 S.W.3d 39, 46 (Tex. App.—Austin 2011, pet. denied) (holding the failure to establish actionable nuisance—as distinguished from nuisance—prevented the trial court from granting injunctive relief). Accordingly, the question failed to submit a controlling issue and the answers to it were properly disregarded. *See Abdullatif*, 561 S.W.3d at 604.

D. Appellants did not need to rehash the evidence they introduced at trial in their opening brief because the discussion is irrelevant to the issues presented in this appeal.

Appellants' lengthy factual recitation in their brief discussing events as far back as 2008 is not relevant to the critical issues presented in this appeal, *i.e.*, whether the jury's findings on the "statutory" public nuisance claim can support a judgment where (1) appellants lack standing to pursue declaratory or injunctive relief that would enable them to enforce the City's ordinances and declare a public nuisance under Chapter 16; (2) the "statutory" public nuisance claim based upon the alleged dereliction of duties by a governmental entity is not an independent claim recognized in Texas; and (3) the question submitted to the jury is immaterial and could not have supported a judgment in appellants' favor. These were the grounds presented in the JNOV motion. To affirm on any one of these grounds, the Court does not need to wade through appellants' voluminous briefing. Accordingly,

Ramirez will not burden the Court with any additional, unnecessary discussion of the things Ramirez and the City did or did not do in the decades before trial.

II. The trial court correctly refused to submit a common-law public nuisance claim.

The trial court's decision to grant Ramirez's directed verdict is reviewed under a legal sufficiency standard of review. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). In this connection, the directed verdict was properly granted on appellants' common-law public nuisance claim because appellants failed to produce legally sufficient evidence to support an essential element of their claim. *See Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). In reviewing the ruling on the motion for directed verdict, the Court is not bound by the grounds urged by Ramirez; the directed verdict may also be affirmed on another ground not specifically identified in the motion or resulting order. *See Reyna v. First Nat'l Bank in Edinburg*, 55 S.W.3d 58, 69 (Tex. App.—Corpus Christi 2001, no pet.).

A. Appellants had to show they suffered a substantial special injury.

A plaintiff asserting a common-law public nuisance claim must show he "suffered a ***substantial*** 'special injury' different in kind from that suffered by the general public." *Serafine v. Blunt*, No. 03-16-00131-CV, 2017 WL 2224528, at *5 (Tex. App—Austin May 19, 2017, pet. denied) (mem. op.) (emphasis added). Contrary to appellants' position that there is no requirement the special injury must be substantial, this standard has long been recognized in Texas. *See Ingram v. Turner*, 125 S.W. 327, 329 (Tex. Civ. App.—Austin 1910, writ ref'd) ("While it is true that an individual citizen, in a proper case, may obtain equitable relief for the abatement of a public nuisance, yet in order to do so he must show a ***substantial*** and ***special injury*** to him, different from that to the public generally.") (emphasis added); *see also McQueen v. Burkhart*, 290 S.W.2d 577, 579 (Tex. Civ. App.—Austin 1956, no writ) (quoting same).[8] If the plaintiff cannot make the requisite showing, then he cannot proceed on the claim. *Jamail*, 970 S.W.2d at 676. Just as he did in the trial court, Ramirez maintains there is no

[8] Appellants' complaint that the trial court incorrectly applied a more stringent standard has no merit. *See Appellants' Br. at 39*. Irrespective of appellants' complaint, the record shows that appellants failed to prove any sort of special injury. *See Section II, infra*.

evidence to show a substantial specific injury that would permit appellants to proceed on their common-law public claim.

In challenging the directed verdict, appellants assert that they came forward with evidence of a substantial special injury. Appellants divide their alleged special injury into two categories: (1) injury to their business interests and (2) injury caused by pollution. There is, however, no evidence to support either category.

B. Appellants failed to produce any evidence of a special injury based upon damage to their business interests.

Appellants' assertion that their business interests were adversely affected is based upon the theory that the City should not have permitted Ramirez to operate his metal recycling yards. *12 RR 11:2-25*. As a result, appellants speculate that they must have suffered some sort of economic damage by having another competitor in the market. *See Appellants' Br. at 46*. Further, according to appellants, Ramirez caused the City to regulate metal recyclers more strictly as a "disfavored business," which in turn required appellants to incur additional costs.[9] *Appellants' Br. at 45-46*. And,

[9] Appellants also asserted that their special injury could also be based upon the harm allegedly caused to the metal recycling industry generally. *See Appellants' Br. at 45* (complaining "that because of Ramirez, the City treated the recycling industry as a disfavored business, trying to push them out of the City"). But appellants cite no authority holding that an injury to an entire industry—as opposed to a single member of that industry—is sufficient to maintain a public nuisance claim. A special injury necessarily contemplates a unique injury to an individual plaintiff. *See Serafine*, 2017 WL 2224528, at *5. Ramirez's research did not reveal authorities addressing a "special injury" to an

relatedly, appellants asserted the City was more lenient in enforcing Chapter 16 against Ramirez than appellants, and this somehow gave Ramirez a competitive advantage. *See 12 RR 11:10-25*.

Appellants' theory is flawed and not supported by the record. There is no direct causal relationship between Ramirez's operation and the special injury appellants assert they suffered. Further, the allegations underlying appellants' purported special injury are not supported by any evidence. To the extent appellants even attempted to offer evidence proving a special injury, that evidence cannot be considered because it is based upon pure speculation and is legally no evidence.

1. *There is no direct causal connection between Ramirez and appellants' alleged special injury.*

It is clear from the relevant authorities that there must be a *direct* connection between the cause of the nuisance and the special injury. This rule is demonstrated by examining a case cited extensively in appellants' opening brief. In *United Food and Commercial Workers International Union v. Wal-Mart Stores, Inc.*, No. 02-15-00374-CV, 2016 WL 6277370 (Tex. App.—Fort Worth Oct. 27, 2016, pet. denied) (mem. op.), the defendant labor organizations blocked public streets and intersections thereby

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entire industry composed of individual members that may or may not have any individualized injury.

preventing access to and from Wal-Mart stores. *Id.* at *8. The labor organizations argued that Wal-Mart had not shown a special injury. *Id.* The court disagreed. *Id.* While "the general public suffered an interference with the public right of travel," the court reasoned that Wal-Mart suffered a special injury in that its customers were prevented from entering or exiting Wal-Mart's stores. *Id.* This fact, according to the court, demonstrated an injury to Wal-Mart's "business interests, different in kind and degree than that of the general public." *Id.* There is, therefore, a direct connection between the cause of the nuisance (labor organizers blocking a public street) and the special injury (interference with customers' ability to shop at Wal-Mart).

No similar causal connection exists in this appeal. The bulk of the appellants' special injury allegations relate to actions taken or not taken by the City. The City, however, is a home-rule city, which means it has the "full power of self-government and authority to do anything the Legislature could have authorized" it to do. *RCI Entm't (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 595 (Tex. App.—San Antonio 2012, no pet.) (citing Tex. Const. art. XI, § 5). Ramirez, therefore, has no ability to control what the City does or does not do. Indeed, appellants have acknowledged this fact given that they have sued the City multiple times seeking relief like that

sought in the underlying suit. Ultimately, Ramirez cannot be held personally responsible and be subject to injunctive relief for actions taken or not taken by the City. *See McQueen*, 290 S.W.2d at 579.

2. *Appellants' "special injury" discussion is based upon pure speculation and unproven allegations.*

Evidence that is purely speculative in nature is legally insufficient and cannot raise a fact issue. *See Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 650 (Tex. 1994) (per curiam). "Evidence must transcend mere suspicion." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). "Evidence that is so slight as to make any inference a guess is in legal effect no evidence." *Id.* But speculation and guesses are all that appellants offered. Thus, the trial court did not err in granting a directed verdict and not submitting a question to the jury on common-law public nuisance. *See id.*

a. *There is no evidence to show appellants suffered economic damages by the mere existence of a competitor.*

Appellants claimed that they suffered economic damages simply because Ramirez was permitted to operate. To prove up these damages, appellants offered Keith Fairchild as an expert on loss of market value, including lost rents and profits. *8 RR 13:10-13*. Ramirez, however, objected to Fairchild's proposed testimony and opinions because they are based upon pure speculation. *8 RR 21:1-9*.

In developing a damage model, Fairchild assumed that all revenues generated by Ramirez would have automatically flowed to appellants. *8 RR 13:21-25* ("And if they were not operating and assuming that those revenues would have accrued to Texas Auto Salvage, then what would the profits be."), *14:18-20* ("My understanding, again, is the allegation is that they shouldn't even be in business to begin with and that all those revenues would have gone to Texas Auto Salvage."), *19:19-20* (same).

When pressed on voir dire whether it was pure speculation to assume that all of Ramirez's customers would have chosen appellants over every other metal recycler in town, Fairchild waivered: "I mean, they're right across the street from each other. Now, would it all have gone there? That's questionable." *8 RR 15:6-11*. Indeed, the assertion is pure speculation because, at the time of trial, there were 68 operating metal recycling and auto salvage yards in San Antonio and there is no basis for appellants' assertion that every potential customer would have chosen appellants over every one of their competitors. *5 RR 110:10-23, 143:22-25; see also 8 RR 21:1-9*. Given all of this, the trial court sustained Ramirez's objection and Fairchild was not permitted to testify. *8 RR 22:7-11* (stating Fairchild's "methodology is flawed").[10] This was the correct decision.

[10] Appellants incorrectly state that the trial court excluded Fairchild's testimony as irrelevant. *See Appellants' Br. at 48-49* ("The Trial Court would not permit the expert

Appellants offered no other competent evidence to show that it personally suffered any economic losses as a result of the alleged public-nuisance. There is no evidence showing any individualized harm to appellants resulting from Ramirez's operations. Wholly unsupported allegations are simply not enough.

b. *There is no evidence to show Ramirez has a competitive advantage.*

Appellants also alleged that Ramirez had a competitive advantage because he is able to pay more for scrap metal because he keeps his operating costs lower by not complying with the relevant regulations. *See 3 RR 152:19-25; see also 9 RR 158:1-5; 12 RR 11:20-25*. The record, however, does not contain any evidence regarding difference between the parties' operating costs and the amounts each paid for scrap metal. Therefore, appellants' assertion that they are somehow at a competitive disadvantage is pure speculation.[11] *See Szczepanik*, 883 S.W.2d at 650; *see also Ridgway*, 135 S.W.3d at 601.

financial information to be offered, determining it was not relevant."). As established above, Ramirez did not object to Fairchild's testimony on relevancy grounds. *8 RR 21:1-9*.

[11] Even if there were some evidence to support the competitive advantage allegation, it is not clear that an alleged unfair competitive advantage is a special injury that would give rise to a public nuisance claim. Appellants have not cited any supporting authority. The trial court was skeptical of appellants' unfair competition argument in the nuisance context. *9 RR 158:1-17*.

c. *Ramirez did not cause increased regulation.*

Appellants make the wholly unsupported assertion that they were somehow harmed because Ramirez personally caused the metal recycling industry to be subject to greater regulation. There is simply no evidence to support this assertion. Yet again, appellants failed to produce any evidence to show a special injury, substantial or otherwise.

C. Appellants failed to produce any evidence of a special injury based upon pollution allegedly caused by Ramirez.

The record contains no evidence demonstrating a special injury to appellants resulting from Ramirez's alleged polluting activities. There is no evidence regarding a diminution in the market or rental value of appellants' property. There is no evidence that appellants' property suffered any physical damage. There is no evidence that appellants themselves suffered any physical harm. Finally, there is no evidence that appellants' personal property was harmed.

Appellants only speculated that they had suffered or will suffer a special injury as a result of pollution allegedly caused by Ramirez. But appellants only discuss potential injuries that could be experienced by the public in general and not those specifically suffered by appellants. *See, e.g., Appellants' Br. at 49-50* (discussing odors that "invaded the neighborhood,"

contaminated water that flows into a storm sewer, and a potential fire hazard). Further, to the extent appellees assert they will personally suffer an injury simply because they are across the street from Ramirez's operation, that assertion must be rejected because it is based upon pure speculation. *See Ridgway*, 135 S.W.3d at 601. Accordingly, because there is no evidence of a special injury stemming from the pollution allegedly caused by Ramirez, the directed verdict was properly granted.[12]

D. Appellants' reliance upon authorities outside of the public nuisance context is misplaced and unnecessary.

In analyzing whether Ramirez was entitled to a directed verdict, the Court focuses upon whether there was any evidence to support essential elements of the common-law public nuisance claim. *See Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. As detailed above, the relevant inquiry is whether appellants brought forth any evidence of a special injury. *See Jamail*, 970 S.W.2d at 676. Ramirez maintains that appellants did not meet their evidentiary burden.

[12] Appellants rely upon authorities in which the court did not have to make a determination as to whether a plaintiff proved the existence of a special injury. For example, in *Kjellander v. Smith*, 652 S.W.2d 595 (Tex. Civ. App.—Tyler 1983, no writ.), the court had to presume the trial court found the plaintiffs suffered a special injury to support a temporary injunction because no findings of fact and conclusions of law were requested or filed. *Id*. at 597, 600.

Appellants directed the Court to several decisions that have no application here. Many of the cases cited in appellants' opening brief involve *pretrial* jurisdictional challenges as opposed to a motion for directed verdict where the issue is whether a plaintiff brought forth sufficient evidence to support his claim to warrant submission of the claim to the jury. This distinction is critical.

A court does not determine whether the plaintiff will prevail on his claims when the defendant asserts the plaintiff lacks standing. The "question of standing is distinct from the question of proof." *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) (orig. proceeding). In assessing standing, a court construes "'the pleadings in favor of the plaintiff'" and looks "'to the pleader's intent" to determine if the allegations are sufficient to confer jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (citation omitted); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex. 1968), which is cited repeatedly by appellants, demonstrates this point. The court in *Touchy* simply determined that the allegations set forth in plaintiffs' pleadings were sufficient to demonstrate plaintiffs had standing to move forward with their suit. 432 S.W.2d at 694. The court even gave instructions

that would govern in an eventual trial. *Id*. at 694-95.[13] Obviously, a different situation is presented in this appeal.

III. Appellants did not present a valid request for declaratory relief.

Even if the "statutory" public nuisance question was correctly submitted, it cannot support a request for declaratory relief under the Uniform Declaratory Judgments Act (UDJA). It provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Tex. Civ. Prac. & Rem. Code § 37.004(a). The plain language in the provision provides that a party may seek declaratory relief to construe an ordinance or test its validity. *See id*.; *see also Schmitz*, 550 S.W.3d at 353 (explaining the UDJA allows "courts to declare an affected person's rights, status, or legal

[13] In *Touchy*, the court determined the plaintiffs, who are individual lawyers, had alleged a sufficient interest in the legal profession to "enjoin the unauthorized practice of law or conduct of non-lawyers which is demeaning to the legal profession and harmful to the plaintiffs." 432 S.W.2d at 694. The court also cited the public's interest in being protected from the unauthorized practice of law. *Id*. Appellants, however, provide no basis to extend the analysis in *Touchy* to metal recyclers. And there is likely no basis to do so given the stark differences between the legal profession and the metal recycling industry. *See Bohatch v. Butler & Binion*, 977 S.W.2d 543, 559 (Tex. 1998) (Phillips, C.J., dissenting) ("The practice of law is a profession first, then a business. Moreover, it is a self-regulated profession subject to the Rules promulgated by this Court.").

relations regarding a 'question of construction or validity arising under' a municipal ordinance"). But appellants did not seek to do either.

Chapter 16 was not being applied to appellants, which meant they had no basis to contest its validity. There were also no competing constructions of Chapter 16 before the trial court. Rather, appellants only sought to enforce the City's ordinances through a request for declaratory relief. This is not a permissible use of the UDJA. *City of Mansfield*, 2020 WL 4006674, at *12-13 (holding that citizen landowners "do not have a right to enforce the ordinance through a UDJA claim"). Accordingly, appellants were not entitled to any declaratory relief or any other remedy afforded by Chapter 37 of the Civil Practice and Remedies Code.

IV. The trial court's rulings on appellants' so-called expert witnesses were correct.

A. Appellants have waived any complaint with respect to the exclusion of Keith Fairchild and Jerry Arredondo as expert witnesses.

1. Appellants have waived any complaint regarding so-called experts through inadequate briefing.

Appellants waived their complaint regarding Fairchild through inadequate briefing. *See* Tex. R. App. P. 38.1(i); *see also Bruce v. Cauthen*, 515 S.W.3d 495, 507 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). The Rules of Appellate Procedure require the appellants' brief to include "a clear

and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). Briefing that consists solely of conclusory allegations without any substantive analysis is inadequate. *See Howeth Invests., Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 902 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see also Approximately $198,006.00 United States Currency v. State*, No. 07-19-00275-CV, 2020 WL 4249740, at*4 (Tex. App.—Amarillo July 21, 2020, no pet. h.) (mem. op.).

Appellants' discussion in their brief regarding the trial court's decision to exclude Fairfield consists of 3 sentences:

> Dr. Fairchild was prepared to testify regarding the net revenues both generated. RR8:14. The Trial Court would not permit the expert financial information to be offered, determining it was not relevant. RR8:22. If this Court requires such data, TASI respectfully urges that this Court reverse the Trial Court's Judgment and remand this case to be retried, allowing Dr. Fairchild to provide the financial data.

Appellants' Br. at 48-49. The foregoing passage provides no analysis explaining how the trial court abused its discretion in excluding Fairchild. Indeed, appellants incorrectly state that Fairchild was excluded on relevancy grounds and do not address the actual basis for the trial court's ruling: Fairchild had to be excluded because his testimony and opinions are based upon pure speculation. *See 8 RR 21:1-9*. Accordingly, the Court should

conclude the complaint is waived. *See Howeth Invests., Inc.*, 259 S.W.3d at 902.

The trial court permitted Jerry Arredondo to testify as a fact witness with respect to the events that he observed and was involved in. *8 RR 87:8-10*. The trial court, however, declined to have Arredondo admitted as "a generalized expert on everything." *8 RR 84:4-13*. Appellants had sought to have Arredondo declared an expert on 6 different subject areas. *8 RR 66:2-3; see also 8 RR 66-83*.

Appellants' briefing offers only a vague, conclusory discussion regarding the trial court's decision not to permit Arredondo to testify as an expert. Appellants' briefing on this issue is confined to a single footnote. *See Appellants' Br. at 48 n.34*. In it, appellants do not articulate how the trial court abused its discretion by refusing to allow appellants to bolster Arredondo's testimony by having him admitted as an expert. Instead appellants simply conclude that Arredondo could have given "the jury and judge an even deeper understanding" of the issues they believed were relevant. *Appellants' Br. at 48 n.34*. This explanation is wholly insufficient and should lead the Court to conclude that any complaint regarding Arredondo has been waived. *See Howeth Invests., Inc.*, 259 S.W.3d at 902.

2. Appellants did not preserve any complaint regarding Fairchild and Arredondo by not making an offer of proof.

Even if there is no briefing waiver, the Court should hold that appellants failed to preserve their appellate issues because they failed to make an offer of proof with respect to the testimony that was excluded by the trial court. "To challenge exclusion of evidence by the trial court on appeal, the complaining party must present the excluded evidence to the trial court by offer of proof." *Sink v. Sink*, 364 S.W.3d 340, 347 (Tex. App.—Dallas 2012, no pet.); *see also Marr v. Faglie*, No. 04-09-00703-CV, 2010 WL 3699990, at *2 (Tex. App.—San Antonio Sept. 22, 2010, no pet.) (mem. op.) ("Without an offer of proof, reviewing courts cannot determine whether the exclusion of evidence was harmful."). Appellants, therefore, failed to preserve their complaints regarding Fairchild and Arredondo. *See Sink*, 364 S.W.3d at 347.

B Keith Fairchild was properly excluded.

Appellants bear the burden to show the trial court abused its discretion by excluding Fairchild as an expert witness. *See K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000). To meet that burden, appellants must show that the trial court's decision "is arbitrary, unreasonable or without reference to any guiding rules or legal principles." *Id.* They cannot show an abuse of discretion because expert testimony grounded in speculation is unreliable

and is, therefore, inadmissible. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002).

Appellants offered Fairchild as an expert on loss of market value, including lost rents and profits. *8 RR 13:10-13*. As discussed at length above, Fairchild's testimony and opinions do not constitute competent evidence because they are based upon pure speculation. *See section II.B., supra; see also 8 RR 21:1-9*. "Opinions which are purely speculative or conjectural in their nature should be excluded." *Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 741 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

In developing a damage model, Fairchild assumed that all revenues generated by Ramirez would have automatically flowed to appellants. *8 RR 13:21-25*, *14:18-20*, *19:19-20*. He made this assumption even though there were 68 metal recycling and auto salvage yards operating in San Antonio at the time of the trial. *5 RR 110:10-23, 143:22-25; see also 8 RR 21:1-9*. He confirmed that it was pure speculation to assume that all of Ramirez's customers would have chosen appellants over every other metal recycler in town. *8 RR 15:6-11*. ("I mean, they're right across the street from each other. Now, would it all have gone there? That's questionable."). Appellants have not shown how the trial court abused its discretion by excluding Fairchild when his "methodology is flawed." *8 RR 22:7-11*.

C. The trial court did not abuse its discretion by not allowing Jerry Arredondo to testify as an expert witness.

Appellants have not shown that the trial court's decision not to permit Arredondo to testify as an expert "is arbitrary, unreasonable or without reference to any guiding rules or legal principles." *See K-Mart Corp.*, 24 S.W.3d at 360. Appellants' sole argument is that Arredondo should have been permitted to testify as an expert and this "expert testimony" would have given "an even deeper understanding" of the issues they discussed in their trial presentation. *Appellants' Br. at 48 n.34.* But Arredondo testified extensively as a fact witness. *See generally 8 RR 88-124.* Appellants have not explained why and have not directed the Court to any authorities holding that it was an abuse of discretion not to permit Arredondo to offer his testimony as an expert.

Even if appellants could show an abuse of discretion, which they cannot, any error by the trial court is harmless. Appellants have not shown or even discussed how the trial court's alleged error probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a). Indeed, appellants' own briefing establishes why any error is harmless. Appellants assert that it was necessary for Arredondo to testify as an expert to give the judge and jury "a deeper understanding" regarding issues addressed by other

witnesses. The only way to interpret this explanation is that the excluded expert testimony—for which no offer of proof was made—is cumulative. The erroneous exclusion of cumulative evidence is harmless error. *See Schreiber v. State Farm Lloyds*, 474 S.W.3d 308, 317 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 870 (Tex. 2009)). Accordingly, the Court may also affirm because appellants failed to demonstrate harmful error. *See id.* at 317-18.

V. The jury's negative findings on appellants' private nuisance claim are not against the great weight and preponderance of the evidence.

Appellants failed to meet their burden to show the jury's negative findings on their private nuisance claim are against the great weight and preponderance of the evidence. *See R.B. Hardy & Sons, Inc. v. Hoyer Global (USA), Inc.*, No. 01-09-00041-CV, 2010 WL 2305753, at *3-4 (Tex. App.—Houston [1st Dist.] June 10, 2010, pet denied) (mem. op.); *see also Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). To show a private nuisance, a plaintiff must prove the following:

> (1) the plaintiff had an interest in the land; (2) the defendant interfered with or invaded the plaintiff's interest by conduct that was negligent, intentional, or abnormal and out of place in its surroundings; (3) the defendant's conduct resulted in a condition that substantially interfered with the plaintiff's use and enjoyment of his land; and (4) the nuisance caused injury to the plaintiff.

Cerny v. Marathon Oil Corp., 480 S.W.3d 612, 622 (Tex. App.—San Antonio 2015, pet. denied). In this connection, the jury charge question asked whether Ramirez's intentional or negligent conduct substantially interfered with appellants' use and enjoyment of their land. *3 CR 978*.

The jury's negative findings should not be disturbed because there is no evidence that Ramirez's operations substantially interfered with appellants' use and enjoyment of their property. Appellants offered no evidence demonstrating that they personally suffered any impact from Ramirez's actions. Appellants' short discussion in their opening brief regarding the private nuisance claim consists solely of generalized allegations regarding the effect of Ramirez's alleged polluting activities on the public at large. *See Appellants' Br. at 55-57*. Appellants do not cite to any evidence discussing how Ramirez's actions affected their ability to use and enjoy their property. Appellants do not do so because there no evidence to cite. Accordingly, the Court should conclude there is no basis to set aside the jury's negative findings. *See Mathis v. Barnes*, 377 S.W.3d 926, 930 (Tex. App.—Tyler 2012, no pet.) (holding there was factually sufficient evidence to support the jury's determination that the defendant is not liable to the plaintiff for creating a nuisance).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellees D D Ramirez, Inc., Danny Ramirez Recycling, Inc., San Antonio Auto and Truck Salvage, Danny's Recycling & Precious Metals, LLC, Danny's Recycling, Inc. and Daniel Delagarza Ramirez respectfully request that the Court affirm the trial court's final judgment. Appellees pray for other and further relief to which they may be justly and equitably entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, the undersigned certifies that the foregoing computer-generated brief contains 11,068 words.

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CERTIFICATE OF SERVICE

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